

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ORA MAE FASICK,	)	Case No. EDCV 12-1314-JPR
	)	
Plaintiff,	)	
	)	MEMORANDUM OPINION AND ORDER
vs.	)	AFFIRMING THE COMMISSIONER
	)	
CAROLYN W. COLVIN, Acting	)	
Commissioner of Social	)	
Security, <sup>1</sup>	)	
	)	
Defendant.	)	
	)	

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**I. PROCEEDINGS**

Plaintiff seeks review of the Commissioner's final decision denying her application for Social Security disability insurance benefits ("DIB"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed March 26, 2013, which the Court has taken under submission without oral argument. For the reasons stated

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<sup>1</sup> On February 14, 2013, Colvin became the Acting Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d), the Court therefore substitutes Colvin for Michael J. Astrue as the proper Respondent.

1 below, the Commissioner's decision is affirmed and this action is  
2 dismissed.

### 3 **II. BACKGROUND**

4 Plaintiff was born on September 21, 1956. (Administrative  
5 Record ("AR") 111.) She has a high school education and  
6 vocational training as a pharmacy technician. (AR 156-57.) She  
7 previously worked as a cashier, pharmacy technician, and  
8 substitute teacher. (AR 130-36, 145-46.)

9 On July 25, 2009, Plaintiff filed an application for DIB.  
10 (AR 109-15.) Plaintiff alleged that she had been unable to work  
11 since June 15, 2008, because of foot pain, back injury, anxiety  
12 attacks, "choking feeling," sleeplessness, "osteo," shortness of  
13 breath, and a work-related back injury. (AR 111, 143.) Her  
14 application was denied initially, on October 13, 2009 (AR 44),  
15 and upon reconsideration, on February 26, 2010 (AR 45).

16 On June 7, 2010, Plaintiff requested a hearing before an  
17 ALJ. (AR 58.) A hearing was held on May 16, 2011, at which  
18 Plaintiff, who was represented by counsel, appeared and  
19 testified; a vocational expert ("VE") also testified. (AR 29-  
20 43.) In a written decision issued on June 10, 2011, the ALJ  
21 determined that Plaintiff was not disabled. (AR 8-22.) On June  
22 11, 2012, the Appeals Council denied Plaintiff's request for  
23 review. (AR 1-4.) This action followed.

### 24 **III. STANDARD OF REVIEW**

25 Pursuant to 42 U.S.C. § 405(g), a district court may review  
26 the Commissioner's decision to deny benefits. The ALJ's findings  
27 and decision should be upheld if they are free of legal error and  
28 supported by substantial evidence based on the record as a whole.

§ 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such evidence as a reasonable person might accept as adequate to support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla but less than a preponderance. Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports a finding, the reviewing court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1996). "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Id. at 720-21.

#### IV. THE EVALUATION OF DISABILITY

People are "disabled" for purposes of receiving Social Security benefits if they are unable to engage in any substantial gainful activity owing to a physical or mental impairment that is expected to result in death or which has lasted, or is expected to last, for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

##### A. The Five-Step Evaluation Process

The ALJ follows a five-step sequential evaluation process in assessing whether a claimant is disabled. 20 C.F.R. § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th

1 Cir. 1995) (as amended Apr. 9, 1996). In the first step, the  
2 Commissioner must determine whether the claimant is currently  
3 engaged in substantial gainful activity; if so, the claimant is  
4 not disabled and the claim must be denied. § 404.1520(a)(4)(i).  
5 If the claimant is not engaged in substantial gainful activity,  
6 the second step requires the Commissioner to determine whether  
7 the claimant has a "severe" impairment or combination of  
8 impairments significantly limiting her ability to do basic work  
9 activities; if not, a finding of not disabled is made and the  
10 claim must be denied. § 404.1520(a)(4)(ii). If the claimant has  
11 a "severe" impairment or combination of impairments, the third  
12 step requires the Commissioner to determine whether the  
13 impairment or combination of impairments meets or equals an  
14 impairment in the Listing of Impairments ("Listing") set forth at  
15 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is  
16 conclusively presumed and benefits are awarded.  
17 § 404.1520(a)(4)(iii). If the claimant's impairment or  
18 combination of impairments does not meet or equal an impairment  
19 in the Listing, the fourth step requires the Commissioner to  
20 determine whether the claimant has sufficient residual functional  
21 capacity ("RFC")<sup>2</sup> to perform her past work; if so, the claimant  
22 is not disabled and the claim must be denied.  
23 § 404.1520(a)(4)(iv). The claimant has the burden of proving  
24 that she is unable to perform past relevant work. Drouin, 966  
25 F.2d at 1257. If the claimant meets that burden, a prima facie

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27 <sup>2</sup> RFC is what a claimant can still do despite existing  
28 exertional and nonexertional limitations. 20 C.F.R. § 404.1545;  
see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 case of disability is established. Id. If that happens or if  
2 the claimant has no past relevant work, the Commissioner then  
3 bears the burden of establishing that the claimant is not  
4 disabled because she can perform other substantial gainful work  
5 available in the national economy. § 404.1520(a)(4)(v). That  
6 determination comprises the fifth and final step in the  
7 sequential analysis. § 404.1520; Lester, 81 F.3d at 828 n.5;  
8 Drouin, 966 F.2d at 1257.

9 B. The ALJ's Application of the Five-Step Process

10 At step one, the ALJ found that Plaintiff had not engaged in  
11 any substantial gainful activity since May 31, 2006.<sup>3</sup> (AR 13.)  
12 She found that although Plaintiff had worked after the alleged  
13 onset date, it was an "unsuccessful work attempt" and thus did  
14 not "constitute disqualifying substantial gainful activity."  
15 (Id.) At step two, the ALJ concluded that Plaintiff had the  
16 severe impairments of "fibromyalgia; osteopenia; hypertension;  
17 mild Raynaud's syndrome; mild degenerative lumbar spine and  
18 cervical spine; neuroma in the feet, status-post surgical  
19 removals on the left; and obesity." (Id.) At step three, the  
20 ALJ determined that Plaintiff's impairments did not meet or equal  
21 any of the impairments in the Listing. (AR 16.) At step four,  
22 the ALJ found that Plaintiff retained the RFC to perform light  
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27 <sup>3</sup> Plaintiff's application for DIB alleged an onset date  
28 of June 15, 2008. (See AR 111.) In her July 2009 Disability  
Report, however, Plaintiff alleged that she became unable to work  
on May 31, 2006. (AR 143.)

1 work.<sup>4</sup> (AR 17.) Based on the VE's testimony, the ALJ concluded  
2 that Plaintiff was able to perform her past relevant work as a  
3 pharmacy technician and retail cashier clerk. (AR 21.) At step  
4 five, the ALJ concluded that Plaintiff was not disabled. (AR  
5 22.)

## 6 **V. DISCUSSION**

7 Plaintiff alleges that the ALJ erred in (1) evaluating the  
8 opinions of her treating physicians and (2) evaluating her  
9 credibility. (J. Stip. at 3.) Neither contention warrants  
10 reversal.

### 11 A. The ALJ Properly Evaluated the Medical Evidence

12 Plaintiff contends that the ALJ failed to properly consider  
13 medical evidence from her treating physicians indicating that her  
14 foot impairments "significantly worsened" in June 2008 and  
15 remained disabling through the date of the hearing. (J. Stip. at  
16 5-12.) Plaintiff does not appear to contest the ALJ's findings  
17 as to any impairments other than her foot pain. (See id.)  
18 Plaintiff is not entitled to remand because the ALJ provided  
19 legally sufficient reasons for her evaluation of the medical  
20 evidence.

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22 <sup>4</sup> "Light work" is defined as involving "lifting no more  
23 than 20 pounds at a time with frequent lifting or carrying of  
24 objects weighing up to 10 pounds." 20 C.F.R. § 404.1567(b). The  
25 regulations further specify that "[e]ven though the weight lifted  
26 may be very little, a job is in this category when it requires a  
27 good deal of walking or standing, or when it involves sitting  
28 most of the time with some pushing and pulling of arm or leg  
controls." Id. A person capable of light work is also capable  
of "sedentary work," which involves lifting "no more than 10  
pounds at a time and occasionally lifting or carrying [small  
articles]" and may involve occasional walking or standing.  
§ 404.1567(a)-(b).

1           1.   Applicable law

2           In determining disability, the ALJ "must develop the record  
3 and interpret the medical evidence" but need not discuss "every  
4 piece of evidence" in the record. Howard v. Barnhart, 341 F.3d  
5 1006, 1012 (9th Cir. 2003). The ALJ is responsible for resolving  
6 conflicts in the medical evidence. Carmickle v. Comm'r, Soc.  
7 Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008). When evidence  
8 in the record is susceptible to more than one rational  
9 interpretation, the ALJ's decision must be affirmed. Vasquez v.  
10 Astrue, 572 F.3d 586, 591 (9th Cir. 2009).

11           2.   Relevant facts

12           On October 28, 2005, Plaintiff reported to Physician's  
13 Assistant Nitza Glick that her "main problem is pain in her feet"  
14 that "occurs exclusively as the day goes on, worse at the end of  
15 the day"; she reported that there was "no pain in the morning,"  
16 however. (AR 212.) A physical examination had "unremarkable"  
17 results. (AR 213.) PA Glick referred Plaintiff to orthopedics  
18 for her foot problems. (AR 213-14.)

19           On August 21, 2006, Plaintiff saw Dr. Panna Shah, who noted  
20 that Plaintiff reported "severe" "burning" in her feet and  
21 "difficulty . . . walking and standing because of the pain." (AR  
22 239.) A physical examination showed "diminished temperature up  
23 to ankles bilaterally" and "mild signs of polyneuropathy" but  
24 otherwise unremarkable results. (AR 239-40.) Plaintiff was  
25 referred to an EMG nerve conduction study "to rule out tarsal  
26 tunnel syndrome and also to further investigate her symptoms in  
27 terms of sciatica." (AR 240.) Plaintiff underwent the nerve  
28 conduction study on September 13, 2006; it returned uniformly

1 "normal" results and "no evidence of tarsal tunnel syndrome or  
2 large fibre polyneuropathy." (AR 246.) On September 14, 2006,  
3 Plaintiff returned to Dr. Shah for a follow-up exam; Dr. Shah  
4 noted that the nerve conduction study results were normal but  
5 Plaintiff "continues to have a lot of pain in her legs and feet  
6 and unfortunately has to stand at work for long hours." (AR  
7 247.) On October 25, 2006, Dr. Shah saw Plaintiff again and  
8 noted that Plaintiff's "nerve conductions were normal" and she  
9 "continues to have pain in her left feet and back pain" but "[a]  
10 [l]ot of it is related to excess weight gain." (AR 248.)

11 On April 16, 2007, Plaintiff saw podiatrist Dr. Melissa  
12 Claussen for "aching pain, burning pain, shooting pain" in her  
13 feet. (AR 257.) Dr. Claussen noted that Plaintiff's pain was  
14 "made worse with putting shoes on" and "more activity" but made  
15 better by "[t]aking her shoes off and rubbing her feet." (Id.)  
16 She also noted that Plaintiff "has custom-molded forefoot  
17 orthoses, which she says does not seem to help much." (Id.) Dr.  
18 Claussen examined Plaintiff and noted some tenderness in the feet  
19 and Tinel's sign<sup>5</sup> with palpation of the third interspace  
20 bilaterally; she also noted that Plaintiff had normal muscle  
21 strength, her rheumatology workups were negative, radiology  
22 "revealed no significant abnormality," Plaintiff's symptoms were  
23 consistent with "systemic neuropathy or nerve etiology," and  
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25 <sup>5</sup> Tinel's sign is "an indication of the existence of  
26 something; any objective evidence of a disease . . . as opposed  
27 to the subjective sensations (symptoms) of the patient." Tinel's  
28 sign - definition of Tinel's sign in the medical dictionary, The  
Free Online Medical Dictionary, Thesaurus and Encyclopedia,  
<http://medical-dictionary.thefreedictionary.com/Tinel%27s+sign>  
(last visited May 22, 2013).



1 Plaintiff's foot tenderness was "consistent with a neuroma." (AR  
2 257, 263.)

3 On June 5, 2007, Dr. Claussen gave Plaintiff injections into  
4 the third interspace of both feet, which gave her "significant  
5 relief for several weeks." (AR 274.) Dr. Claussen noted that  
6 Plaintiff returned for a second injection when the "pain, burning  
7 and tingling . . . returned" because the first injections had  
8 been so effective in relieving her pain. (Id.)

9 On July 16, 2007, Dr. Duc Nho Nguyen examined Plaintiff and  
10 found that her neurological symptoms were "normal" and her  
11 musculoskeletal examination showed "normal range of motion, . . .  
12 no edema and no tenderness." (AR 284.) Plaintiff saw Dr. Nguyen  
13 again on November 6, 2007, at which time she reported back pain  
14 and "recurrent foot pain"; Dr. Nguyen noted that Plaintiff was  
15 "following up with podiatry." (AR 287.)

16 On June 19, 2008, Plaintiff saw Dr. Moses Park and reported  
17 that she continued to wear orthotic shoes for her foot pain but  
18 even in her shoes she could stand for only about an hour before  
19 having significant pain. (AR 367.) Dr. Park reported that an x-  
20 ray revealed a "[s]mall calcaneal heel spur" and advised  
21 Plaintiff to continue to wear orthotics, exercise, and lose  
22 weight. (Id.) He referred Plaintiff to orthopedics to discuss  
23 "possible resection" of a neuroma. (Id.) He also noted that  
24 Plaintiff's job "does not require her to stand up for prolonged  
25 of [sic] time, because she is substituting at school," but "[s]he  
26 may need to be standing for longer than an hour at a time if she  
27 returns to her original work as a pharmaceutical technician."  
28 (Id.)

1 On September 16, 2008, Plaintiff saw orthopedist Dr. Malcolm  
2 Heppenstall. (AR 379.) He noted that Plaintiff reported  
3 difficulty standing because of pain in her feet, which was not  
4 "significantly relieved" by injections. (Id.) Dr. Heppenstall  
5 examined both feet and noted "no erythema, induration or evidence  
6 of inflammation" but "definite tenderness to palpation over  
7 healed incision sites in both feet." (Id.) He also noted that  
8 Plaintiff's x-rays were "within normal limits" and her  
9 [n]eurocirculatory status is otherwise normal." (Id.) He  
10 recommended pain medication and "wider and longer shoes." (Id.)  
11 On September 30, 2008, Dr. Heppenstall reported that Plaintiff  
12 "[s]till has painful feet"; he encouraged her not to have any  
13 more cortisone injections and again suggested "appropriate wider  
14 and longer shoes," but he noted that "certainly nothing here  
15 needs surgical approach." (AR 376.)

16 On November 11, 2008, however, Dr. Heppenstall operated on  
17 Plaintiff to remove an interdigital neuroma in her left foot.  
18 (AR 389.) He reported that Plaintiff "tolerated the procedure  
19 well and left the operating room in good condition." (Id.) The  
20 next day, Dr. Heppenstall reported that Plaintiff was "[d]oing  
21 well post surgery." (AR 388.) On December 30, 2008, he noted  
22 that Plaintiff was "[i]mproving dramatically." (AR 395.) On  
23 January 6, 2009, he noted that Plaintiff had an infection in her  
24 foot but her "[p]ain is significantly less at this time." (AR  
25 342.) On February 10, 2009, Dr. Heppenstall noted that  
26 Plaintiff's foot was "improving" but there was "still moderate  
27 discomfort." (AR 343.) He gave her "some foot cookies" to  
28 relieve pressure on her metatarsal head areas. (Id.) On March

1 17, 2009, Dr. Heppenstall noted that Plaintiff still had  
2 "moderate pain present in both feet, in the web spaces between  
3 the 3rd and 4th toes," and gave her an injection for the pain.  
4 (AR 345.) He noted that he would see her again in two weeks and  
5 discuss "her shoes and how they relate to her foot pain." (Id.)

6 On January 26, 2009, Plaintiff saw Dr. Park for a "routine  
7 visit." (AR 340.) Dr. Park noted that Plaintiff's sciatica "has  
8 gotten a little bit worse in the recent few weeks since she had  
9 the neuroma surgery done," but she had "[n]o significant  
10 discomfort to the foot at this time." (Id.) On April 27, 2009,  
11 Plaintiff again saw Dr. Park, who noted that Plaintiff had some  
12 discomfort in her left foot at the balls of the feet but "good  
13 strength" in all four extremities, "[g]ood gait[,] and normal  
14 balance." (AR 347.)

15 On May 12, 2009, Plaintiff saw Dr. Heppenstall, who noted  
16 that her left foot was "still somewhat improved" but that she had  
17 "some problems" with the right foot as well. (AR 358.) On May  
18 18, 2009, Plaintiff was referred by Dr. Heppenstall to Dr. Robert  
19 Klein for an electrodiagnostic study. (AR 354.) Dr. Klein noted  
20 that Plaintiff had "continuing" pain in her left foot after her  
21 surgery. (Id.) He performed a physical examination and noted  
22 that Plaintiff had "[n]ormal gait," no muscle weakness in the  
23 legs, and "equivocal Tinel's over the left tarsal tunnel with a  
24 feeling of tingling on the foot that was not experienced on the  
25 right." (Id.) The nerve conduction study and EMG exam showed  
26 "normal" results with "no electrical sign of peripheral  
27 neuropathy, tarsal tunnel syndrome, or lumbar radiculopathy."  
28 (Id.)

1 On June 2, 2009, Dr. Heppenstall noted that Plaintiff still  
2 had "moderate pain" in her left foot but "she seems to be getting  
3 about reasonably well but discomfort does persist." (AR 359.)  
4 He prescribed antiinflammatory medication. (Id.) On July 21,  
5 2009, Dr. Heppenstall noted that Plaintiff "still has trouble  
6 between her 3rd and 4th toes, with persistent pain there," and  
7 gave her an injection. (AR 360.)

8 On October 6, 2009, Plaintiff underwent a consultative  
9 orthopedic examination with board-certified orthopedist Dr.  
10 William Boeck, Jr. (AR 403-09.) Dr. Boeck noted that Plaintiff  
11 drove herself to the examination. (AR 403.) Plaintiff stated  
12 that she had suffered from tingling and pain in her feet since  
13 2005 and that orthotics did not help. (Id.) She stated that she  
14 continued to have pain in her left foot after her surgery and  
15 could wear only slippers. (Id.) She stated that the pain was  
16 aggravated by standing and walking. (Id.) Dr. Boeck observed  
17 that Plaintiff was wearing slippers and her gait was "somewhat  
18 slow with a tendency to keep the weight off the ball of the foot,  
19 particularly on the left side," but her range of motion in the  
20 feet and ankles was normal. (AR 405-07.) Based on his physical  
21 examination of Plaintiff and his observations during the  
22 examination, Dr. Boeck concluded that Plaintiff was capable of  
23 performing medium work with no postural or manipulative  
24 limitations but would "require proper orthotic management in this  
25 regard." (AR 407.)

26 On October 15, 2009, state agency physician Dr. S. Laiken  
27 reviewed the record and concluded that Plaintiff was capable of  
28

1 performing medium work.<sup>6</sup> (AR 417-21, 422-24.)

2 On November 17, 2009, Dr. Heppenstall noted that Plaintiff  
3 "still has significant foot problems and definite tenderness  
4 between the 3rd and 4th toes on her left foot." (AR 437.) He  
5 stated that "we may very well have to proceed with exploration of  
6 this area, unless her discomfort resolves." (Id.)

7 On November 10, 2009, Plaintiff saw family practitioner Dr.  
8 Daniel Bradford, who noted continuing pain in Plaintiff's left  
9 foot as well as "complications with infection and nonhealing and  
10 then scarring and recurrence of the pain." (AR 439.) He noted  
11 that Plaintiff complained that her foot pain was "still bad,  
12 probably worse than before the neuroma." (Id.) On November 24,  
13 2009, Dr. Bradford saw Plaintiff for complaints of hypertension  
14 and anxiety. (AR 438.) He also noted that Plaintiff "did get to  
15 see the orthopedist and has been referred to orthopedics  
16 subspecialty for continued pain in her foot." (AR 438.) On  
17 December 8, 2009, Dr. Bradford noted that Plaintiff saw a  
18 specialist for her foot, who suggested reoperating on the  
19 neuroma. (AR 441.) On December 22, 2009, Dr. Bradford noted  
20 that Plaintiff had a neuroma on her toe. (AR 440.)

21 On February 18, 2010, state-agency physician Dr. G. Rivera-  
22 Miya reviewed the record and concluded that Plaintiff was capable  
23 of performing medium work. (AR 442-43.)

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25 <sup>6</sup> "Medium work" is defined as "lifting no more than 50  
26 pounds at a time with frequent lifting or carrying of objects  
27 weighing up to 25 pounds." 20 C.F.R. § 404.1567(c). The  
28 regulations further specify that "[i]f someone can do medium  
work, we determine that he or she can also do sedentary and light  
work," as defined in § 404.1567(a)-(b). Id.

1 On March 22, 2010, Dr. Bradford noted that Plaintiff had  
2 another surgery on her foot and was "quite happy with the results  
3 so far," "says the pain is better" and the site was "healing much  
4 better," and wanted to have the same surgery on the other foot.  
5 (AR 450.) On May 25, 2010, Dr. Bradford noted that Plaintiff had  
6 surgery on her toe and her pain in that toe was "gone" but she  
7 was now experiencing pain in the toe next to it. (AR 449.) He  
8 noted that she had had an injection but "had no benefit from  
9 that." (Id.)

10 On July 14, 2010, Plaintiff saw podiatrist Dr. John  
11 Williams, who noted a "possible recurrent neuroma in her left  
12 foot." (AR 444.) He noted that she had surgeries in November  
13 2008 and March 2010, the latter of which was "more successful,"  
14 but Plaintiff continued to have "shooting pain in her left foot"  
15 and "similar symptoms in her right foot but not as severe."  
16 (Id.) Dr. Williams noted pain on palpation of the left forefoot  
17 and "minimal tenderness to palpation" in the right foot. (Id.)  
18 He recommended a series of injections before considering  
19 additional surgeries. (Id.)

20 On September 9, 2010, Dr. Bradford noted that Plaintiff  
21 "looks more comfortable than she has been in the past" and her  
22 "foot pain in the toes is gone." (AR 446.) He noted that  
23 Plaintiff elected not to have any more surgeries because her foot  
24 pain might be connected to her fibromyalgia. (Id.) On December  
25 13, 2010, Dr. Bradford noted that Plaintiff did have another  
26 surgery "for her neuroma on her foot" and reported "[s]ome  
27 bruising there, but things are feeling better." (AR 445.)  
28

1                   3.    Analysis

2           The ALJ found that Plaintiff's subjective complaints were  
3 not entirely credible and her daily activities belied her  
4 complaints of disabling pain. (AR 18.) She also made the  
5 following finding:

6                   The record reveals that the claimant's allegedly  
7 disabling impairment was present at approximately the  
8 same level of severity prior to the alleged onset date.  
9 The fact that the impairment did not prevent the claimant  
10 from working at that time strongly suggests that it would  
11 not currently prevent work.

12 (AR 18.)

13           The ALJ then exhaustively summarized the aforementioned  
14 medical evidence. (AR 19-21.) She gave "significant but not  
15 full weight" to Dr. Boeck's opinion that Plaintiff could perform  
16 medium work because Dr. Boeck had not had the benefit of  
17 considering Plaintiff's hearing testimony or an opportunity to  
18 review the medical evidence. (AR 21.) She also did not give  
19 great weight to the determinations of the state-agency physicians  
20 that Plaintiff could do medium work because they had not had the  
21 benefit of considering the additional evidence submitted after  
22 their review of the record, including medical evidence and  
23 Plaintiff's hearing testimony. (Id.) The ALJ noted that her  
24 determination of Plaintiff's RFC "takes into account the benign  
25 objective findings but also generously considers the claimant's  
26 subjective complaints." (AR 21.) She also noted that all of the  
27 physicians to consider Plaintiff's RFC found that Plaintiff was  
28 "not disabled" and capable of performing medium work. (Id.) She

1 gave Plaintiff the benefit of the doubt, however, and concluded  
2 that Plaintiff was capable of performing only light work. (AR  
3 21-22.)

4 Plaintiff argues that the ALJ erred in finding that the  
5 severity of her foot pain was the same before the alleged onset  
6 date as after. (J. Stip. at 4-12; AR 18.) That finding,  
7 however, was supported by substantial evidence in the record.

8 The "starting point" in determining the onset of disability  
9 "is the individual's statement as to when the disability began."  
10 Copeland v. Bowen, 861 F.2d 536, 541 (9th Cir. 1988.) If the  
11 claimant's statement is not consistent with the "medical or work  
12 evidence," the ALJ must look to "additional evidence" in the  
13 record "to reconcile the discrepancy." Id.

14 Here, Plaintiff alternately claimed that her disability  
15 began on May 31, 2006, and June 15, 2008. (See AR 111, 143,  
16 144.) Plaintiff attempted to continue working as a pharmacy  
17 technician in September 2006 and as a substitute teacher  
18 periodically thereafter between 2007 and 2008; she finally  
19 stopped attempting to work in June 2008. (See AR 144.) As the  
20 ALJ correctly found, however, the record showed that Plaintiff's  
21 symptoms did not change significantly from 2006 to 2008 or indeed  
22 from either of those dates until the present date.<sup>7</sup> To the  
23 extent the ALJ erred in determining that Plaintiff's alleged  
24 onset date was in May 2006 instead of June 2008, then, any such  
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26  
27 <sup>7</sup> Indeed, Plaintiff admits that "[if] anything, Plaintiff  
28 has erred in failing to formally allege a more accurate onset  
date of September 2006." (J. Stip. at 26.)



1 error was harmless.<sup>8</sup> See Stout v. Comm'r, Soc. Sec. Admin., 454  
2 F.3d 1050, 1055 (9th Cir. 2006) (nonprejudicial or irrelevant  
3 mistakes harmless).

4 The record showed that Plaintiff began experiencing foot  
5 pain as far back as 2005. (AR 212-14.) From 2006 all the way  
6 through 2010, Plaintiff sought treatment for her foot pain,  
7 including surgery and injections; she reported at times that her  
8 foot pain had improved or gone away completely, and at other  
9 times she reported that the pain had come back or worsened. (See  
10 AR 239-40, 257, 274, 287, 340, 342, 343, 345, 354, 358, 359, 360,  
11 367, 379, 388, 395, 437, 439, 444, 445, 446, 449, 450.) Doctors  
12 who examined Plaintiff during those times noted very few  
13 significant abnormalities, and objective test results were  
14 largely normal. (See AR 213, 239-40, 246, 248, 257, 263, 284,  
15 347, 354, 367, 379, 403-09.) The most recent evidence in the  
16 record, Dr. Bradford's notes from September and December 2010,  
17 shows that Plaintiff's foot pain was "gone" and she was "feeling  
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19 <sup>8</sup> Plaintiff also asserts that the ALJ erred in finding  
20 that the record did not "contain any referrals or recommendation  
21 to see a specialist" for fibromyalgia, "such as a  
22 rheumatologist," because Dr. Kenneth Epstein, who Plaintiff saw  
23 in September 2006, was a rheumatologist. (AR 14, 241-42.) But  
24 Dr. Epstein apparently evaluated Plaintiff primarily for Lupus,  
25 not fibromyalgia, and thus the ALJ's finding that she never saw a  
26 rheumatologist for her fibromyalgia was correct; moreover, the  
27 report cited by Plaintiff doesn't mention her feet. (See AR 241-  
28 42.) In any event, despite the paucity of medical evidence  
supporting Plaintiff's claims of fibromyalgia, the ALJ  
nonetheless concluded that it was a severe impairment, and  
therefore any error the ALJ might have committed in this regard  
was necessarily harmless. (See AR 13); Stout, 454 F.3d at 1055.  
Finally, the issue is irrelevant because Plaintiff does not  
contest the ALJ's findings as to her fibromyalgia. (See J. Stip.  
at 4-12.)

1 better" after her surgery. (AR 445-46.)

2 Plaintiff cites the same evidence as the ALJ and essentially  
3 argues that the ALJ should have relied on the various statements  
4 in the record that Plaintiff's foot pain was worsening to find  
5 her disabled, instead of relying on the various statements in the  
6 record that Plaintiff's foot pain had improved or gone away  
7 completely to find her not disabled. (See J. Stip. at 4-12.)  
8 But the Court must consider the ALJ's decision in the context of  
9 "the entire record as a whole," and if the "evidence is  
10 susceptible to more than one rational interpretation, the ALJ's  
11 decision should be upheld." Ryan v. Comm'r of Soc. Sec., 528  
12 F.3d 1194, 1198 (9th Cir. 2008) (internal quotation marks  
13 omitted). Here, although certain evidence in the record, if  
14 interpreted more favorably to Plaintiff, might lead to a  
15 conclusion different from that reached by the ALJ, it is not this  
16 Court's function to reinterpret the evidence. Any conflict in  
17 the properly supported medical evidence was the sole province of  
18 the ALJ to resolve. See Thomas v. Barnhart, 278 F.3d 947, 956-57  
19 (9th Cir. 2002). Reversal is not warranted on this basis.<sup>9</sup>

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20  
21 <sup>9</sup> Plaintiff also argues that the ALJ should have found  
22 her disabled under the Social Security Medical-Vocational  
23 Guidelines (the "Grids," see 20 C.F.R. pt. 404, subpart P, app.  
24 200.00 et seq.) because she is "over 50 years of age, incapable  
25 of performing past work with no transferable skills and with a  
26 sedentary residual functional capacity at most." (See J. Stip.  
27 at 12.) As discussed herein, the ALJ properly found at step four  
28 that Plaintiff was capable of performing her past relevant work;  
thus, the Grids, which are used at step five, did not apply. See  
Hoopai v. Astrue, 499 F.3d 1071, 1075 (9th Cir. 2007). In any  
event, the VE testified that Plaintiff did have transferrable  
skills (see AR 41), and Plaintiff cites no evidence in the record  
to the contrary. And under the Grids, a person of Plaintiff's  
age and educational background who has an RFC for sedentary work

1       B.    The ALJ Did Not Err in Assessing Plaintiff's  
2            Credibility

3       Plaintiff argues that the ALJ failed to provide clear and  
4   convincing reasons for discounting her credibility. (J. Stip. at  
5   22-30.) Because the ALJ did provide clear and convincing reasons  
6   supporting her evaluation of Plaintiff's testimony and those  
7   reasons were supported by substantial evidence in the record,  
8   reversal is not warranted on this basis.

9           1.   Applicable law

10       An ALJ's assessment of pain severity and claimant  
11   credibility is entitled to "great weight." See Weetman v.  
12   Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779  
13   F.2d 528, 531 (9th Cir. 1986). "[T]he ALJ is not required to  
14   believe every allegation of disabling pain, or else disability  
15   benefits would be available for the asking, a result plainly  
16   contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674  
17   F.3d 1104, 1122 (9th Cir. 2012). In evaluating a claimant's  
18   subjective symptom testimony, the ALJ engages in a two-step  
19   analysis. See Lingenfelter, 504 F.3d at 1035-36. "First, the  
20   ALJ must determine whether the claimant has presented objective  
21   medical evidence of an underlying impairment [that] could  
22   reasonably be expected to produce the pain or other symptoms  
23   alleged." Id. at 1036 (internal quotation marks omitted). If  
24   such objective medical evidence exists, the ALJ may not reject a

25  
26       \_\_\_\_\_  
27   (as Plaintiff concedes she does) and transferrable skills must be  
28   found "not disabled." See 20 C.F.R. pt. 404, subpart P, apps.  
201.07, 201.08. Thus, even if the Grids applied, the ALJ did not  
err in determining that Plaintiff was not disabled.

1 claimant's testimony "simply because there is no showing that the  
2 impairment can reasonably produce the *degree* of symptom alleged."  
3 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in  
4 original). When the ALJ finds a claimant's subjective complaints  
5 not credible, the ALJ must make specific findings that support  
6 the conclusion. See Berry v. Astrue, 622 F.3d 1228, 1234 (9th  
7 Cir. 2010). Absent affirmative evidence of malingering, those  
8 findings must provide "clear and convincing" reasons for  
9 rejecting the claimant's testimony. Lester, 81 F.3d at 834. If  
10 the ALJ's credibility finding is supported by substantial  
11 evidence in the record, the reviewing court "may not engage in  
12 second-guessing." Thomas, 278 F.3d at 959.

13 2. Relevant facts

14 In July 2009 Plaintiff completed a Disability Report  
15 alleging that she was "in constant pain" and that "pain in both  
16 feet affects standing and walking." (AR 143.) She alleged that  
17 lifting "over 10-15 lbs. causes back pain to penetrate down legs  
18 and into pelvic area," and the operation to remove the neuroma  
19 from her left foot left her foot pain "much worse! Not better!"  
20 (Id.) She stated that she had pain when showering, cooking,  
21 cleaning, and grocery shopping. (Id.) She also stated that her  
22 job as a pharmacy technician required her to be on her feet, as  
23 did her job as a substitute teacher, and she could not  
24 concentrate at work because the pain was all she could think  
25 about. (Id.) She stated that her feet "have become more painful  
26 as time goes by." (AR 144.)

27 On August 1, 2009, Plaintiff filled out an Exertion  
28 Questionnaire. (AR 159-61.) She stated that she did not "walk

1 great distances unless I have too [sic]," such as "[a]round  
2 grocery store if no motor cart." (AR 159.) She stated that she  
3 could climb stairs but had to do so slowly and carefully; could  
4 not lift anything over 10 pounds but could lift laundry baskets  
5 three or four times a week and grocery baskets two or three times  
6 a week; did her own grocery shopping two to three times a week;  
7 cleaned her own home "every day," including sweeping, mopping,  
8 vacuuming, dusting, doing laundry, cooking, and gardening; could  
9 drive a car for "close to an hour" before needing to stop and  
10 stretch; and did yard work including planting, watering, weeding,  
11 and trimming plants. (AR 160, 162.) She noted that she used a  
12 motor cart for shopping but otherwise did not use any assistive  
13 devices. (AR 161.) She reiterated that her foot pain was  
14 "constant." (Id.)

15 In November 2009, Plaintiff filled out another Disability  
16 Report, alleging that her pain had gotten worse since the report  
17 she completed in July 2009. (AR 169.) She stated that the pain  
18 in her right foot had "gotten worse" and the pain in her left  
19 foot had "gotten so bad I can't put weight on the ball of it."  
20 (Id.) She stated that she could not put any weight on her left  
21 foot, needed to ride in a motorcart to grocery shop and needed  
22 "to have someone go and help me every time," and was in  
23 "constante [sic] pain" "to where it's all I can think about."  
24 (Id.) She stated that she needed help from family and friends  
25 "for the cleaning and general up keep" of her home. (AR 176.)  
26 She also stated that she was "walking less, because of the lump  
27 on the bottom of my left foot." (Id.)

28 On July 7, 2010, Plaintiff submitted a handwritten statement

1 noting that she continued to have foot pain and that her brother  
2 had come from Florida to help her with driving and household  
3 chores. (AR 180.)

4 At the hearing, Plaintiff testified that she could not work  
5 because of her "left foot mostly." (AR 32.) She stated that she  
6 had had three surgeries on her left foot but they only "made it  
7 worse." (AR 34.) She stated that she could stand "[m]aybe 15  
8 minutes" at a time before having to rest, could vacuum for 15 to  
9 20 minutes at a time but it took her "three days" to vacuum her  
10 1500-square-foot house because she needed to rest so frequently,  
11 and could not grocery shop without one of "those carts." (Id.)  
12 She testified that her pain in both feet was "getting worse."  
13 (AR 35.) She testified that she spent "more than half of the  
14 day" sitting or lying down in a recliner. (AR 37.) She stated  
15 that her brother had helped her with household chores until he  
16 had a heart attack, and her husband helped "as much as he can"  
17 but was "gone a lot" for work. (Id.) She stated that the  
18 cortisone injections did not help her foot pain. (AR 38.)

### 19 3. Analysis

20 The ALJ noted that she had considered Plaintiff's testimony  
21 and her responses to the Exertional Questionnaire stating that  
22 she could not stand for more than 15 minutes at a time, walk  
23 great distances, lift more than 10 pounds, or do housework for  
24 more than 15 to 30 minutes at a time. (AR 17-18.) She found  
25 that Plaintiff's "allegations concerning the intensity,  
26 persistence and limiting effects of her symptoms are less than  
27 fully credible . . . because those allegations are greater than  
28 expected in light of the objective evidence of record." (AR 18.)

1 The ALJ noted that Plaintiff underwent surgery for the neuroma on  
2 her left foot, which "would normally weigh in [Plaintiff's]  
3 favor" but was "offset by the fact that the record reflects that  
4 the surgery was generally successful in relieving the symptoms."  
5 (Id.) She further noted that the "positive objective clinical  
6 and diagnostic findings since the alleged onset date . . . do not  
7 support more restrictive functional limitations than those  
8 assessed herein." (Id.) She also noted that no doctor had  
9 "endorse[d] the extent of [Plaintiff's] alleged functional  
10 limitations." (Id.) She then made the following additional  
11 findings as to Plaintiff's daily activities:

12 [D]espite her impairment, the claimant has engaged  
13 in a somewhat normal level of daily activity and  
14 interaction. The claimant admitted activities of daily  
15 living including cleaning the bathroom, including the  
16 tub, shower, counters, sinks, toilet, rug, mirror and  
17 tile; she stated she was able to clean the kitchen  
18 including sweep and mop floors, counters and stove; she  
19 reported she could vacuum carpet and furniture; dust,  
20 wash laundry and cook [(AR 159-62.)]. Some of the  
21 physical and mental abilities and social interactions  
22 required in order to perform these activities are the  
23 same as those necessary for obtaining and maintaining  
24 employment. Although, the claimant has stated she  
25 requires frequent breaks to perform these daily  
26 activities, two factors weigh against considering these  
27 allegations to be strong evidence in favor of finding the  
28 claimant disabled. First, allegedly limited daily

1 activities cannot be objectively verified with any  
2 reasonable degree of certainty. Secondly, even if the  
3 claimant's daily activities are truly as limited as  
4 alleged, it is difficult to attribute that degree of  
5 limitation to the claimant's medical condition, as  
6 opposed to the other reasons, in view of the relatively  
7 weak medical evidence and other factors discussed in this  
8 decision. Overall, the claimant's reported limited daily  
9 activities are considered to be outweighed by the other  
10 factors discussed in this decision.

11 (AR 18.)

12 Reversal is not warranted based on the ALJ's alleged failure  
13 to make proper credibility findings or properly consider  
14 Plaintiff's subjective symptoms. The ALJ provided clear and  
15 convincing reasons for rejecting Plaintiff's subjective symptom  
16 testimony to the extent it was inconsistent with the RFC  
17 assessment. (AR 17-18.) As the ALJ correctly found, Plaintiff's  
18 testimony that nothing helped her foot pain and it had only  
19 gotten worse conflicted with the notes from her treating  
20 physicians stating that Plaintiff said her foot pain had improved  
21 at various times with treatment. (AR 18; see AR 193 (noting that  
22 Plaintiff walked with a "normal gait" and was in "no acute  
23 distress"), AR 359 (noting that Plaintiff was "getting about  
24 reasonably well"), AR 395 (noting "dramatic" improvement in  
25 Plaintiff's foot pain), AR 445 (Plaintiff "doing well" following  
26 third surgery and "things are feeling better"), AR 446 (noting  
27 that Plaintiff's "foot pain in the toes is gone"), AR 449 (noting  
28 that after surgery Plaintiff's pain was "gone"), AR 450



1 (reporting being "happy with the results so far" and "the pain is  
2 better").)

3 Plaintiff argues that the fact that she underwent three  
4 surgeries shows that they conferred only a "short term benefit"  
5 and did not provide enough relief to allow her to work. (J.  
6 Stip. at 11-12.) While it is true that Plaintiff's foot pain  
7 appears to have come back after her first two surgeries, the most  
8 recent medical evidence in the record pertaining to her third  
9 surgery contradicts her claims that the surgery "made it worse."  
10 (AR 33-34; see AR 446 (noting in September 2010 that Plaintiff's  
11 "foot pain in the toes is gone"), AR 445 (noting that Plaintiff  
12 "doing well" in December 2010 following third surgery and "things  
13 are feeling better").)<sup>10</sup> Further, test results ranging from 2006  
14 to 2010 showed no significant abnormalities, which further cast  
15 doubt on Plaintiff's claims of debilitating pain. (See AR 213,  
16 239-40, 246, 248, 257, 263, 284, 347, 354, 367, 379, 402-09.)  
17 And, as the ALJ correctly found, the only doctors to have  
18 evaluated Plaintiff's functional capacity all concluded that she  
19 was not disabled and was capable of performing medium work. (AR  
20 403-08, 417-24, 442-43.) The ALJ properly discounted Plaintiff's  
21 subjective testimony to the extent it conflicted with the medical  
22 record. See Carmickle, 533 F.3d at 1161 ("Contradiction with the  
23 medical record is a sufficient basis for rejecting the claimant's  
24 subjective testimony."); Lingenfelter, 504 F.3d at 1040 (in  
25 determining credibility, ALJ may consider "whether the alleged  
26

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27 <sup>10</sup> For this reason, any error arising from the ALJ's  
28 ambiguous reference to "surgery" instead of "surgeries" was  
harmless.

1 symptoms are consistent with the medical evidence"); Burch v.  
2 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of  
3 medical evidence cannot form the sole basis for discounting pain  
4 testimony, it is a factor that the ALJ can consider in his  
5 credibility analysis."); Kennelly v. Astrue, 313 F. App'x 977,  
6 979 (9th Cir. 2009) (same).

7       Moreover, as the ALJ noted, Plaintiff admitted that she was  
8 able to do a wide variety of daily activities, including driving,  
9 grocery shopping, cooking, cleaning, and extensive gardening.  
10 (AR 18, 34-35, 159-61.) That Plaintiff's allegations of  
11 disabling pain were inconsistent with her daily activities was a  
12 valid reason for the ALJ to discount her testimony. See Bray v.  
13 Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1227 (9th Cir. 2009)  
14 (ALJ properly discounted claimant's testimony because "she leads  
15 an active lifestyle, including cleaning, cooking, walking her  
16 dogs, and driving to appointments"); Berry, 622 F.3d at 1234-35  
17 (holding that when claimant "told medical staff he engaged in  
18 daily walks of a mile or more, had various social engagements,  
19 drove his car and did crossword puzzles, computer work, pet care,  
20 cooking, laundry and other house-keeping," ALJ properly  
21 discounted claimant's credibility based on "inconsistencies in  
22 [claimant's] reported symptoms and activities"); Molina, 674 F.3d  
23 at 1113 ("Even where [claimant's] activities suggest some  
24 difficulty functioning, they may be grounds for discrediting the  
25 claimant's testimony to the extent that they contradict claims of  
26 a totally debilitating impairment."). Plaintiff asserts that the  
27 ALJ failed to take into account her statements that she could do  
28 those activities only for very limited amounts of time and needed

1 help with them (J. Stip. at 24-25), but the ALJ did take those  
2 claims into account and rejected them because they were not  
3 objectively verifiable and conflicted with the medical evidence  
4 (see AR 18).

5 Because the ALJ gave clear and convincing reasons for her  
6 credibility finding and those reasons were supported by  
7 substantial evidence, the Court "may not engage in  
8 second-guessing," even if it might have reached a different  
9 result. Thomas, 278 F.3d at 959 (citation omitted). Plaintiff  
10 is not entitled to reversal on this claim.

11 **VI. CONCLUSION**

12 Consistent with the foregoing, and pursuant to sentence four  
13 of 42 U.S.C. § 405(g),<sup>11</sup> IT IS ORDERED that judgment be entered  
14 AFFIRMING the decision of the Commissioner and dismissing this  
15 action with prejudice. IT IS FURTHER ORDERED that the Clerk  
16 serve copies of this Order and the Judgment on counsel for both  
17 parties.

18  
19 DATED: June 5, 2013

  
JEAN ROSENBLUTH  
U.S. Magistrate Judge

20  
21  
22  
23  
24  
25  
26 <sup>11</sup> This sentence provides: "The [district] court shall  
27 have power to enter, upon the pleadings and transcript of the  
28 record, a judgment affirming, modifying, or reversing the  
decision of the Commissioner of Social Security, with or without  
remanding the cause for a rehearing."